A

Zameen Worldwide (M) Sdn Bhd & Ors v Asas Global Commodities (M) Sdn Bhd and another case

B

HIGH COURT (SHAH ALAM) — APPEAL SUIT NOS BA-12BNCC-6–02 OF 2018 AND BA-12BNCVC-36–05 OF 2018
SM KOMATHY J
13 JUNE 2019

C

Contract — Restitution — Unjust enrichment — Sessions court judge decided respondents entitled to restitution of money paid to appellants — Appellants appealed against session court judge's decision — Whether respondents entitled to restitution of monies paid

D

Tort — Conspiracy — Allegation of — Sessions court judge decided there was conspiracy by appellants to injure respondents — Appellants appealed against sessions court judge's decision — Whether there was conspiracy proven against respondents

E

Asas Global Commodities (M) Sdn Bhd and Nutrix Plantations Sdn Bhd ('the respondents') were companies dealing in the export of palm oil products. The respondents had appointed the first appellant, Zameen Worldwide (M) Sdn Bhd ('Zameen') as its freight forwarding agent to transport their products. Zameen then appointed another company known as Atlas Services (M) Sdn Bhd ('Atlas Lines') to arrange for the carriage by sea of these products. Problem arose when Zameen failed to pay Atlas Lines for its services which further led the latter to issue a lien on several of the respondents' containers laden with oil products at Bandar Abbas, Iran. To resolve the issue, the respondents had entered into a settlement agreement with Atlas Lines agreeing to pay to Atlas Lines the amount owed to it by Zameen. Atlas Lines had lifted the lien and the containers were then released to the consignee. About a year later, the settlement agreement was varied by the parties by way of a supplemental agreement. On 20 January 2016, the respondents instituted this action against the appellants to recover the sum of RM231,967.70 it had paid Zameen based on the invoices for the said sum. The respondents' claim against Zameen was for restitution and the claim against the second to fourth appellants as the directors and general manager of Zameen was based on the tort of conspiracy. Zameen on the other hand counterclaimed a sum of RM22,291.50 and RM15,386.21 for services rendered to the respondents. The second to fourth appellants invoked the doctrine of separate legal personality as a defence. The learned sessions court judge entered judgment for the respondents, hence, the present appeals. The issues were: (a) whether the sessions judge was right in

F

G

H

I

holding that the respondents were entitled to restitution of the monies paid to the first appellant; and (b) whether the sessions judge was right in holding that the second to fourth appellants had conspired with the first appellant to injure the respondents.

Held, dismissing the first appellant's appeal and allowing the second to fourth appellants' appeal:

(1) The first appellant's argument could not be countenanced in light of the settlement and supplemental agreements between the respondents and Atlas Lines. The respondents having settled the monies due and owing by the first appellant to Atlas Lines, was entitled to restitution and to deny recovery would result in unjust enrichment. In the circumstances, there was no merit in the point canvassed (see paras 12–13).

(2) The court disagreed with the sessions judge that the elements of the tort of conspiracy were proven. It was common ground that the second and third appellants, the wife and mother of the fourth appellant, did not participate in the management of the first appellant. It was the fourth appellant who was the controlling mind of the company. It would mean no liability could be attached to the second and third appellants as they were not the controllers of the company. If it could be said that the second to the fourth appellants were the controllers of the company, the evidence did not demonstrate that there was a conspiratorial agreement between them and the first appellant to injure the respondents. The court was not persuaded that the evidence indicated that the action of the appellants in not forwarding the monies to Atlas Lines was undertaken pursuant to and the implementation of an agreement to injure the respondents. It was not without significance that the amount payable to Altas Lines under the settlement and supplemental agreements were not the same. There was no clear evidence as to why the figure stated to be payable under the settlement agreement, had to be amended by way of a supplemental agreement. It indicated that the appellants' contention of the existence of a dispute as regards the invoices issued by Altas Lines was not improbable and baseless (see paras 20–22).

[Bahasa Malaysia summary

Asas Global Commodities (M) Sdn Bhd dan Nutrix Plantations Sdn Bhd ('responden tersebut') adalah syarikat yang berurusan dengan pengeksportan produk kelapa sawit. Responden telah melantik perayu pertama, Zameen Worldwide (M) Sdn Bhd ('Zameen') sebagai agen penghantaran barang untuk mengangkut produk mereka. Zameen kemudianya melantik syarikat lain yang dikenali sebagai Services (M) Sdn Bhd ('Atlas Lines') untuk mengatur penghantaran melalui laut untuk produk ini. Masalah timbul apabila Zameen gagal untuk membayar Atlas Lines untuk perkhidmatan mereka yang seterusnya membawa kepadanya untuk mengeluarkan lien terhadap beberapa

kontena milik responden yang sarat dengan produk minyak di Bandar Abbas, Iran. Untuk menyelesaikan isu tersebut, responden memasuki perjanjian penyelesaian dengan Atlas Lines bersetuju untuk membayar jumlah berhutang kepadanya oleh Zameen. Atlas Lines telah menarikbalik lien dan kontena telah kemudiannya telah dilepaskan kepada penerima. Kira-kira setahun kemudian, perjanjian penyelesaian telah diubah oleh pihak-pihak dengan cara perjanjian tambahan. Pada 20 Januari 2016, responden memulakan tuntutan ini terhadap perayu untuk mendapatkan semula jumlah RM231,967.70 yang telah dibayar kepada Zameen berdasarkan kepada invois jumlah tersebut. Tuntutan responden terhadap Zameen adalah untuk restitusi dan tuntutan terhadap perayu kedua hingga keempat sebagai pengarah dan pengurus besar Zameen berdasarkan kepada tort konspirasi. Zameen selain daripada itu, membuat tuntutan balas sebanyak RM22,291.50 dan RM15,386.21 untuk perkhidmatan yang diberikan kepada responden. Perayu kedua hingga keempat menggunapakai doktrin personaliti undang-undang berasingan sebagai pembelaan. Hakim Sesyen yang bijaksana telah memberikan penghakiman kepada responden, oleh itu, rayuan ini. Isunya adalah: (a) sama ada hakim sesyen telah dengan tepat dalam memutuskan bahawa responden adalah berhak untuk restitusi wang yang telah dibayar kepada perayu pertama; dan (b) sama ada hakim sesyen telah dengan tepat memutuskan bahawa perayu kedua hingga keempat telah berkomplot dengan perayu pertama untuk merugikan responden.

Diputuskan, menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua hingga keempat:

(1) Hujahan perayu pertama tidak boleh diimbangi berdasarkan kepada perjanjian dan perjanjian tambahan di antara responden dan Atlas Lines. Apabila responden telah menyelesaikan wang yang perlu dibayar dan berhutang oleh perayu pertama kepada Atlas Lines, berhak untuk restitusi dan untuk menafikan pembayaran semula boleh menyebabkan kepada pengkayaan tidak wajar. Dalam keadaan ini, tidak ada merit dalam hal itu (lihat perenggan 12–13).

(2) Mahkamah tidak bersetuju dengan hakim sesyen bahawa elemen untuk tort konspirasi telah dibuktikan. Ianya adalah alasan biasa bahawa perayu kedua dan ketiga, isteri dan ibu kepada perayu keempat, tidak terlibat dalam menguruskan perayu pertama. Ianya adalah perayu keempat yang minda yang mengawal syarikat tersebut. Ini bermakna tiada liabiliti boleh dilekatkan kepada perayu kedua dan ketiga kerana mereka bukan yang mengawal syarikat tersebut. Sekiranya boleh dikatakan bahawa perayu kedua yang mengawal syarikat, tidak ada bukti yang menunjukkan bahawa terdapat perjanjian konspirasi antara mereka dan perayu pertama yang merugikan responden. Mahkamah tidak yakin bahawa keterangan itu menunjukkan bahawa tindakan perayu tidak menyerahkan wang kepada Atlas Lines telah dilakukan menurut dan

kepada pelaksanaan perjanjian untuk merugikan responden. Ianya tanpa kepentingan bahawa amaun yang perlu dibayar kepada Altas Lines di bawah penyelesaian dan perjanjian tambahan tidak sama. Tidak ada keterangan yang jelas tentang mengapa angka yang dinyatakan dibayar di bawah perjanjian penyelesaian itu, terpaksa dipinda dengan cara perjanjian tambahan. Ia menunjukkan bahawa hujahan perayu terhadap wujudnya pertikaian berkenaan dengan invois yang dikeluarkan oleh Altas Lines tidak mustahil dan tidak berasas (lihat perenggan 20–22).]

Notes

For a case on allegation of conspiracy, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 82.

For cases on unjust enrichment, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6958–6960.

Cases referred to

Barclay Pharmaceuticals Ltd v Waypharm LP [2012] EWHC 306 (Comm), QBD (folld)

Concept Oil Services Ltd v En-Gin Group LLP and others [2013] EWHC 1897 (Comm), QBD (folld)

Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd [2009] 2 SLR 318, HC (folld)

Nagase Singapore Pte Ltd v Ching Kai Huat and others [2007] 3 SLR 265, HC (folld)

PT Sandipala Arthaputra and others v Stmicroelectronics Asia Pacific Pte Ltd and others [2018] SGCA 17, CA (folld)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)

The 'Dolphina' [2012] 1 SLR 992, HC (folld)

Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd [2014] SGHC 258, HC (folld)

M Chitra (V Samy & Co) for the appellants.
Aaron Siva Jr Vaitilingam (Sativale Mathew Arun) for the respondent.

SM Komathy J:

THE APPEAL

[1] This was an appeal by the defendants' ('the appellants before me') against the decision of the sessions judge who on 30 April 2018, after a full trial, entered judgment for the plaintiff ('the respondent before me'). The plaintiff's claim against the first defendant company was for restitution, and the claim against its two directors and general manager was based on the tort of conspiracy.

[2] This appeal thus necessitates the consideration of the legal principles in relation to the tort of conspiracy.

THE BACKGROUND

[3] The plaintiff deals in the export of palm oil products. The first defendant ('Zameen') is a freight forwarding company. The second and third defendants were at the material time, the two directors of the Zameen, and the fourth defendant its general manager. The second and third defendants were the wife and mother of the fourth defendant and left the running of the company to him. The fourth defendant was the person in charge and control of the first defendant.

[4] The plaintiff appointed Zameen as its freight forwarding agent to transport its products. Zameen appointed another freight forwarding company, Atlas Lines Services (M) Sdn Bhd ('Atlas Lines'), to arrange for the carriage by sea of these products. Atlas line would invoice Zameen after the plaintiff's products were delivered, and the latter would in turn invoice the plaintiff. The plaintiff made payments based on Zameen's invoices not knowing that the latter had not forwarded these payments to Atlas lines.

[5] In early 2013, Atlas lines approached the plaintiff and complained that it had not been paid by Zameen. A problem arose when Atlas lines issued a lien on several of the plaintiff's containers laden with oil products at Bandar Abbas, Iran. As a result, the containers could not be released to the consignees of the goods. The plaintiff, to avoid paying the expenses that could arise from the delay in the delivery of the goods, entered into a settlement agreement directly with Atlas Lines agreeing to pay to Atlas Lines the amount owed to it by Zameen.

[6] The settlement agreement was in these terms:

> Nutrix Plantations and Asas Global had appointed Zameen Worldwide (M) Sdn Bhd of number 238A, Persiaran Pegaga, Taman Bayu Perdana, Selangor Darul Ehsan as their freight forwarding agent. Zameen Worldwide had appointed Atlas Lines to ship goods belonging to both Nutrix Plantations and Asas Global ...
>
> (a) RM101,877.80 (Ringgit Malaysia one hundred one thousand eight hundred eighty seven and cent eighty only) on or before 31st May 2013;
>
> (b) RM60,000 (Ringgit Malaysia sixty thousand only) on or before 30th June 2013;
>
> (c) RM150,000 (Ringgit Malaysia one hundred fifty thousand fifty thousand only) on or before 13th September 2013; and

(d) The remaining balance of RM392,670.90 (Ringgit Malaysia three hundred ninety two thousand six hundred seventy and cent ninety only) on or before 13th May 2014;

Asas Global shall be liable to Atlas Lines for an amount up to RM129,392.93 (Ringgit Malaysia one hundred twenty nine thousand three hundred ninety two and cent ninety three only)

[7] Whereupon, Atlas lines lifted the lien and the containers were released to the consignee. About a year later, the settlement agreement was varied by the parties by way of a supplemental agreement as follows:

(a) RM5,000 (Ringgit Malaysia five thousand only) per month without interest to be paid by Asas Global to Atlas Lines until full and final settlement thereof;

(b) RM5,000 (Ringgit Malaysia five thousand only) per month without interest to be paid by Nutrix Plantataions to Atlas Lines until full and final settlement thereof; and

(c) Asas Global shall be liable to Atlas for an amount up to RM250,058.93 (Ringgit Malaysia two hundred fifty thousand fifty eight and cents ninety three only).

[8] On 20 January 2016, the plaintiff instituted this action against the defendants to recover the sum of RM231,967.70 it had paid Zameen based on the invoices for the said sum. The plaintiff's claim against Zameen was for restitution on the basis that there had been a total failure of consideration as it had already made payment to Atlas Lines. Whilst the claim against the second to fourth defendants was that they had conspired with the first defendant to injure it and were liable for the losses resulting from that conspiracy. By its defence and counterclaim, Zameen denied there was a total failure of consideration as the consignments had been delivered to the destination port. It counterclaimed a sum of RM22,291.50 and RM15,386.21 for services rendered to the plaintiff. The second to fourth defendants invoked the doctrine of separate legal personality as a defence.

[9] On 30 April 2018, the learned sessions judge after a trial at which viva voce evidence was led, held that the plaintiff was entitled to seek restitution of the sum of RM231,967.70 from Zameen as the payment due to Atlas Lines had been paid under the settlement and supplemental agreements. She further held that the second to fourth defendants were liable to pay the plaintiff for its loss as there was a conspiratorial agreement between them and Zameen to injure the plaintiff, and pursuant to the agreement deliberately did not forward the payment to Atlas Lines.

[10] The learned sessions judge also allowed Zameen's counterclaim for RM38,337.71.

THE ISSUES BEFORE THIS COURT

[11] The key issues raised in this appeal were:

(a) whether the sessions judge was right in holding that the plaintiff was entitled to restitution of the monies paid to Zameen; and

(b) whether the sessions judge was right in holding that the second to fourth defendants had conspired with Zameen to injure the plaintiff.

RESTITUTION

[12] It was the defendants' argument that there was no proof that the plaintiff had suffered any losses because of its action in not forwarding the monies to Atlas Lines. Having considered the evidence, I am in agreement with the learned sessions judge that Zameen's argument could not be countenanced in light of the settlement and supplemental agreements between the plaintiff and Atlas Lines. The plaintiff having settled the monies due and owing by Zameen to Atlas Lines, is entitled to restitution, and to deny recovery would result in unjust enrichment.

[13] In the circumstances, I find no merit in the point canvassed.

TORT OF CONSPIRACY

[14] That brings me to the second issued based on the tort of conspiracy. It was the defendants contention here and below that the plaintiff had no cause of action against them based on the doctrine of separate legal entity. It was said that in law a company is an entirely separate legal entity from the individuals who own and control it. The plaintiff was not entitled therefore to pierce the corporate veil and deny the first defendant its company's status as a separate legal person. The sessions judge therefore erred in law in holding them liable to pay the plaintiff the sum claimed.

[15] The plaintiff countered the argument by submitting that in law a director or an officer of a company who was the controlling mind of a company can conspire with the company he or she controls for purposes of establishing tortious liability. It was argued that the second to fourth defendants had conspired with the Zameen to injure it. It was said that pursuant to this conspiratorial agreement, the defendants had deliberately not forwarded the payment to Atlas Lines to cause injury to it.

[16] To succeed in a claim based on the tort of conspiracy to injure, the following elements need to be proved. See *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393:

(a) an agreement between two or more persons;

(b) an agreement for the purpose of injuring the plaintiff; and

(c) that acts done in execution of that agreement resulted in damage to the plaintiff.

[17] The tort of conspiracy to injure can be classified as comprising of two varieties, namely conspiracy by lawful means and unlawful means a conspiracy by unlawful means is established when two or more people act together to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention is achieved. An unlawful act can either be an act that is a criminal offence, or an intentional act that amounts to a tort. A conspiracy by lawful means does not require an unlawful act to be committed by the conspirators, but only that there is a predominant purpose by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved.

[18] A company is a separate individual from its shareholders and directors. Generally no liability can be imposed on directors in respect of contractual breaches by the company. However, there is now a considerable and still-growing body of authority that accepts that a director can conspire with the company he or she controls for purposes of establishing tortious liability. The tort of conspiracy is often resorted to as an alternative to veil-piercing to extend a company's liability to its directors and controllers. It has been said that the tort of conspiracy affirms rather than negates the company's separate legal status. See *Barclay Pharmaceuticals Ltd v Waypharm LP* [2012] EWHC 306 (Comm); *Concept Oil Services Ltd v En-Gin Group LLP and others* [2013] EWHC 1897 (Comm); *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR 265; *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR 318; *The 'Dolphina'* [2012] 1 SLR 992; *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 and *PT Sandipala Arthaputra and others v Stmicroelectronics Asia Pacific Pte Ltd and others* [2018] SGCA 17. Indeed there are many judicial dicta cautioning that a liberal application of conspiracy liability to companies and their directors who serve merely as its 'arms and legs' would undermine the company's separate legal status.

[19] Applying the principle established in these cases here, it is clear that to succeed, the plaintiff must first show the existence of an agreement between the second to the fourth defendants with the first defendant to injure the plaintiff. The second to fourth defendants were the controlling mind of the company.

Next, it must be shown that the non payment of the monies to Atlas Lines was pursuant to this agreement to injure the plaintiff.

[20] Having examined the evidence, I am unable to agree with the sessions judge that the elements of the tort of conspiracy were proven. It was common ground that the second and third defendants, the wife and mother of the fourth defendant, did not participate in the management of Zameen. It was the fourth defendant who was the controlling mind of the company. This would mean no liability can be attached to the second and third defendants as they were not the controllers of the company.

[21] Even, if contrary to my conclusion, if it could be said that the second to the fourth defendants were the controllers of the company, the evidence does not demonstrate that there was a conspiratorial agreement between them and Zameen to injure the plaintiff. Nor am I persuaded that the evidence indicates that the action of the defendants in not forwarding the monies to Atlas Lines was undertaken pursuant to and the implementation of an agreement to injure the plaintiff. The sessions judge found that the defendants' explanation that the reason why the money was not forwarded to Atlas Lines was not to injure the plaintiff, but because of a dispute they had whether the invoices issued by Atlas Lines was a fabrication and an afterthought. The sessions judge reasoned that this was because of the absence of contemporaneous documents to show that the defendants had ever queried the invoices prior to this action.

[22] With respect, I am unable to agree. It is not without significance that the amount payable to Altas Lines under the settlement and supplemental agreements were not the same. There is no clear evidence as to why the figure stated to be payable under the settlement agreement, had to be amended by way of a supplemental agreement. In my judgment, this indicates that the defendants' contention of the existence of a dispute as regards the invoices issued by Altas Lines is not improbable and baseless.

CONCLUSION

[23] For these reasons, I dismiss the first defendant's appeal but allow the second to fourth defendants' appeal.

First appellant's appeal dismissed; second to fourth appellants' appeal allowed.

Reported by Mohd Kamarul Anwar